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FARMERS INVESTMENT COMPANY

IN THE SUPREME COURT OF THE STATE OF ARIZONA

In Banc

FARMERS INVESTMENT COMPANY, a corporation,

Appellant,

v.

ANDREW L. BETTWY, as State Land Commissioner, and the STATE LAND DEPARTMENT, a Department of the State of Arizona, and PIMA MINING COMPANY, a corporation,

Appellees.

FARMERS INVESTMENT COMPANY, a corporation,

Appellant,

v.

THE ANACONDA COMPANY, a corporation; AMAX COPPER MINES, INC., THE ANACONDA COMPANY, as partners in and constituting ANAMAX MINING COMPANY, a partnership,

Appellees.

CITY OF TUCSON, a municipal corporation,

Appellant,

v.

ANAMAX MINING COMPANY, and DUVAL CORPORATION and DUVAL SIERRITA CORPORATION,

Appellees.

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. . .

No. 11439-2

RESPONSE OF APPELLANT FARMERS INVESTMENT COMPANY TO REHEARING APPLICATIONS

FARMERS INVESTMENT COMPANY, a corporation, Appellant, ("FICO"), will file one memorandum in response to the various rehearing applicacions and memoranda, including the filings by Amici Curiae. An attempt to respond to each in detail is not practical and is, we believe, unnecessary, since each in general parrots the same general and insupportable interpretations of the controlling decisions of this Court.

Generally, the object seems to have been to isolate out some phrase or phrases from these prior decisions of this Court and then to point out that this phrase or paragraph of the Court's decision does not resolve or offer a complete set of controlling legal principles applicable to various imagined fact situations not now before the Court or ripe for adjudication, and then demonstrating that the statement taken out of context as applied to the imagined fact situation leads to a "horrible" result.

Little attention has been paid to the general rule that only facts properly of record are to be argued or presented to the Court. Counsel's unsupported brief and pleading claims, untested in an adversary hearing, are stated as if proved and controlling.

The filings of the amici participants (authorized and unauthorized) substantially repeat the format of quotation out of context applied or attempted to be made applicable to fact situations not before the Court, and then asserting that the Court will be, indeed, most unmindful of its obligations and the welfare of the state if it does not clarify or enlarge upon its opinion (i.e., reform it to suit the individual views and interests of the client whose song the particular lawyer involved has been engaged to sing).

FICO respectfully asserts that a careful, objective and thoughtful reading and understanding of Bristor II (including

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Bristor I for background), Jarvis I, II and III (including also a casual review of State v. Anway) and the FICO decision will yield anyone searching for the true rationale of these decisions (rather than an excuse for carping criticism) a clear, comprehensive and meaningful understanding of the legal principles governing use of Arizona groundwater. Since we are only concerned with Arizona law as explicated by our Arizona Supreme Court, we will limit our response accordingly and will not deal with cases from other jurisdictions.

A REVISIT TO:

Bristor v. Cheatham, 75 Ariz. 227, 255 P. 2d 173 ("Bristor II"); Jarvis v. State Land Department, 104 Ariz. 527, 456 P. 2d 385 ("Jarvis I"); Jarvis v. State Land Department, 106 Ariz. 506, 479 P. 2d 169 ("Jarvis II"); Jarvis v. State Land Department, 113 Ariz. 230, 550 P. 2d 227 ("Jarvis III") and State v. Anway, 87 Ariz. 206, 349 P. 2d 774 ("Anway").

The notion that sentences, phrases or paragraphs can be culled out of context from different opinions of an interrelated series of appellate opinions and pointed to as indicating the true controlling conclusions of the Court upon complex, multi-faceted legal and factual issues is simply foolish, counter-productive to a reasoned and responsible conclusion and indicative of either fuzzy thinking or an intention to create rather than resolve legal problems.

Each of the cases above referred to dealt with a different factual situation as dealt with in the evolving and settled conclusions of this Court as to the legal principles considered to be responsive to the historical Arizona views as to the rights to the use of Arizona groundwater best suited to the needs and welfare of the state and its citizens. Each case must be considered, first, in relationship to the specific problem to which the Court was addressing its attention and,

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secondly, in relationship to the Court's prior pronouncements stating controlling principles of Arizona groundwater law.1/

BRISTOR II

Justice Dudley W. Windes wr te Bristor II, expressing the views and conclusions of the prevailing majority. Justice Windes was a careful, thoughtful jurist blessed with an exceptional knowledge of and feeling for the law. He was a dedicated public servant and jurist.

Accordingly, when Justice Windes notes at the outset of the opinion that the substance of the factual allegations which the Court was considering would be found in Bristor I, we may safely conclude that in fact, the Court in Bristor II was ccnsidering the factual allegations recited in Bristor I.

In Bristor I the factual basis for the plaintiffs' claims were stated as follows:

1. Plaintiffs owned homes serviced by groundwater wells located upon their residence properties, which wells and homes had been developed by them at large expense.

2. A common supply of underground water underlay the premises of plaintiffs and defendants from which plaintiffs had obtained their water supply since 1916.

3. In 1948 and 1949, defendants constructed large wells upon their premises and were pumping water and transporting the water pumped "to other lands owned by defendants about three miles away and not adjacent to the land from which the water was being pumped by defendants."

1/ Counsel for FICO finds the obligation of appearing to interpret the thrust and import of these prior decisions for the Court which authored them anomalous and somewhat amusing. We proceed only upon the basis that we are explaining to learned counsel for our adversaries the true meaning of these cases.

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4. The wells of plaintiffs by reason thereof were dried up and plaintiffs' water supply damaged. 2/

In Bristor II, after considering and rejecting the claim that groundwater should be subject to appropriation, the Court turned to the question of the legality of the defendants' use of groundwater. Justice Windes re-stated the factual basis for the plaintiffs' claim for injunctive relief:

> "With reference to the dismissal of the complaint, we consider the first cause of action thereof. This cause alleges that the plaintiffs since the year 1916 sank certain wells which supplied them with water for domestic purposes; that during the years 1948 and 1949 the defendants sank on their lands a number of large wells for irrigation purposes; that by the operation thereof the water has been drawn from under plaintiffs' lands causing the level to drop to the extent that plaintiffs were deprived of such waters for domestic purposes; that defendants are transporting the water thus pumped from under plaintiffs' land to a distance of approximately three miles for the development and irrigation of lands

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2/ It appears from Bristor I that plaintiffs' lands lay one and one-half miles [illegible] and one mile east of Laveen, while defendants' lands upon which the pumped water was being used lay three miles distant from the premises where defendants' pumps had been installed. The Salt River Valley Critical Area was created September 1, 1951, and enlarged August 14, 1956. (Appendix 2 to Appellant's Opening Brief.) The plaintiffs' lands and the lands of defendants would appear to lie well within the critical area, at least as enlarged. However, it is doubtful if this had the Court's attention, since the Court did not refer to this in either Bristor I or Bristor II.

> not theretofore irrigated; that the waters pumped by the defendants are not used for any beneficial purpose upon the lands from which the same is taken and that the plaintiffs have been suffering and will continue to suffer damages." 75 Ariz. 227 at 235.

The Court then proceeded to examine various precedents and as is customary, arguendo, quoted from them. In so doing, the Court did no more than explain the legal background and reasoning by which various courts had expressed the views of that court (or other legal authority) in reaching a conclusion upon the particular fact situation before it. The practice of separating out various selective quotes from other cases and asserting that such excerpted language represents the holding of the Arizona Court is not profitable and, for like reason, similar use of quotes from decisions of this Court is also generally not helpful if the full thrust of the Court's opinion is not thereby reflected. Illustratively, the Court's language in Bristor II dealing with the definition of "reasonable use" has been widely excerpted and then used as the basis for the unjustified argument that any use which conforms to that definition is a reasonable use and hence a lawful use under Bristor II. The argument wholly ignores that Bristor II requires not only a reasonable use, but also a use upon the land from which the groundwater is pumped before the use meets the Bristor II requirements.

The fact in its quotation from Rothrauff v. Sinking Spring Water Co., 339 Pa. 129, 14 A. 2d 87, 90, the Bristor II Court added its own emphasis to the Rothrauff court is significant:

. . .

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"* * *. But the marked tendency in American jurisdictions in later years has been away from the doctrine that the owner's right to sub-surface waters is unqualified; on the contrary there has been an ever-increasing acceptance of the viewpoint that their use must be limited to purposes incident to the beneficial enjoyment of the land from which they are obtained, and if their diversion or sale to others away from the land impairs the supply of a spring or well on the property of another, such use is not for a 'lawful purpose' within the general rule concerning percolating waters, but constitutes an actionable wrong for which damages are recoverable. 75 Ariz. 227 at 235, 236. [Emphasis, The Arizona Supreme Court.]

The Court concluded:

> "We hold, therefore, that the first cause of action states sufficient facts to warrant relief if supported by the proper evidence." 75 Ariz. 227 at 238.

FICO respectfully suggests that the only reasonable reading of which Bristor II is susceptible may be stated:

> "Groundwater may not be lawfully pumped by an Arizona land owner and transported and used away from the land from which it is produced if thereby the groundwater resource of an adjacent land owner is damaged."

Conversely stated:

> "Groundwater may be pumped by an Arizona land owner and used upon the land from which it is produced even though the groundwater resource of an adjacent land owner is damaged provided the use made by the pumping land owner is a reasonable use, i.e., for a beneficial purpose or use."

A brief comment upon the confusion which seems to have developed in the minds of learned counsel as to the proper application of the terms "off the land", "away from the land", etc., is in order. Contrary to the imagined fears of counsel, the requirement that the water be used upon the land which produced it or liability may result to the user is no more difficult of application than many other legal requirements which must be met if liability is to be avoided. The question is simply one of proof. The requirements of the rule are clear and the obligations and rights of one who would pump groundwater are clear.

Negligence is the doing of an act which a reasonably careful or prudent person would not do under all the circumstances as shown in the evidence, or the failure to do something which a careful and prudent person would do under all the circumstances as developed by the evidence.

What a field day counsel would have with this definition if it was now stated for the first time. How many various fact situations would be conjured up and the assertion made that the rule was simply unworkable; impossible of application.

Counsel are apparently not fully familiar with the expertise of hydrologists and the advanced state of that science in relation to interpretation of groundwater characteristics

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and responses to man-made intrusions into its solitary state.

The recent case of Neal v. Hunt, 112 Ariz. 307, 541 P.2d 559, is illustrative. The record there reveals that a major thrust of the evidence bearing upon groundwater use as related to competing groundwater pumpers was based upon a court-authorized well interference pumping test employing recognized and established technology. The ability of skilled hydrologists to interpret and reach engineering conclusions as to the physical response of groundwater to withdrawal of groundwater by pumping was there demonstrated. This test is but one in the arsenal of the competent hydrologist.

While the rule is simple, clear and understandable, the actual application thereof in varying fact situations may tax the skill and knowledge of the expert. Sensible, usable rules are not to be cast aside merely because in very rare cases the application of the rule may be difficult.

JARVIS I

We said that each case must be read and understood in the light of the particular problem with which this Court was dealing in that case.

In Bristor II the Court was dealing with the rights of individual users from a common supply versus other individual users from the same supply.

In Jarvis II the Court dealt with users of an area in gross versus claims of users from another area, in gross, to take the groundwater from an area overlying the supply of the users complaining to the Court.

In other words, in Jarvis I it was area rights versus area rights and not individual user versus individual user as dealt with in Bristor II.

This distinction is vital and it is also clear. At the outset, the Court reviewed the Bristor cases and quoted

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again, in part, in the Rothrauff quotation relied upon by Justice Windes in Bristor II:

> "'While there is some difference of opinion as to what should be regarded as a reasonable use of subterranean waters, the modern decisions are fairly harmonious in holding that a property owner may not concentrate such waters and convey them off his land if the springs or wells of another land owner are thereby damaged or impaired.* * *'"

with again the emphasis supplied by the Court. To imply or contend therefore that the Jarvis I Court in fact limited or devitalized Bristor II in any respect requires the conclusion that Jarvis I was a sloppy, ill-considered opinion, written without regard to its great importance to the stability of the groundwater law of the state. No such conclusion may be drawn.

The Court then considered the 1948 Ground Water Code and the provisions thereof authorizing the State Land Department to declare or designate critical groundwater areas and then said:

> "In 1954, pursuant to the terms of the Ground Water Code, the Avra and Altar Valleys were declared critical, being included within and as a part of the Marana Critical Ground Water Area. This is an official act of a state agency, the records of which we take judicial notice. State ex rel. Smith v. Bohannan, 101 Ariz. 520, 421 P. 2d 877. That these lands are within a Critical Ground Water Area is alone sufficient to grant

petitioners the relief sought since a Critical Ground Water Area is a ground water basin or a subdivision thereof 'not having sufficient ground water to provide a reasonably safe supply for irrigation of the cultivated lands in the basin at the then current rates of withdrawal.' A.R.S. §45-301. Manifestly, a ground water area or subdivision of a basin which does not have a reasonable safe supply for the existing users can only be but further impaired by the addition of other users or uses." 104 Ariz. 527 at 530.

This Court further said, in dealing with the claim that damages would afford the Avra Valley Area Users adequate relief:

> "To require petitioners and the State of Arizona to now prove damages which may result at some time in the indefinite future when the lands become marginal or wait until the ground water level has so dropped that the lands overlying are no longer productive is unconscionable, harsh, and inequitable. The interests are too great for such a cavalier treatment of the rights here sought to be preserved."
>
> 104 Ariz. 527 at 531.

This Court then ordered injunctive relief as against Tucson in favor of the water users of the Avra Valley as a class of users.

FICO respectfully submits that Jarvis I cannot be reasonably read other than as an affirmation of Bristor II and a holding that pumping of groundwater from within a designated

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critical area and transporting it for use outside such an area results as a matter of law in an enjoinable wrong as against an established lawful user of groundwater within the critical area.

JARVIS II

Again, this Court was dealing with a problem of competing area users, the farmers of Avra Valley as a class versus the Tucson area users as represented by the City of Tucson. Again, so that there could be no mistake, this Court reviewed its approval of Bristor II as expressed in Jarvis I and then said from the holding in Jarvis I:

> "Percolating waters may not be used off the lands from which they are pumped if thereby others whose lands overlie the common supply are injured." 106 Ariz. 506 at 508. [Emphasis added.]

The Court then referred to in excess of thirty cases as generally supporting or illustrating similar Court reasoning and conclusions and then said:

> "Such waters can only be used in connection with the land from which they are taken. . ."

and followed this statement with a reference to an additional approximately ten cases.

Following the citation of these cases, this Court then noted:

> "Tucson questions whether it may pump water from its wells and transport the water so pumped through its pipelines to lands which lie within the watershed but outside the Marana Critical Ground Water Area. From what has been said concerning the American rule of reasonable use, the answer to Tucson's

. . .

> question is, of course, that it may not." 106 Ariz. 506 at 509.

In considering Tucson's claim that the statute only outlawed additional wells within a critical area and hence industrial and municipal wells might be constructed and used, this Court ruled:

> "Tucson argues that since by statute A.R.S. §45-301 et seq. only new irrigation or drainage wells in critical areas having a capacity of more than 100 gallons per minute are prohibited, the Legislature must have intended to permit pumping for municipal purposes without restriction. But the illegality of the use of ground water is not dependent upon whether the Legislature has not forbidden the sinking of wells as a source of supply to be used for municipalities. The right to exhaust the common supply by transporting water for use off the lands from which they are pumped is a rule of law controlled by the doctrine of reasonable use and protected by the constitution of the state as a right in property." 106 Ariz. 506 at 509, 510.

Finally, the fact the Court allowed delivery of water to Ryan Field by Tucson but rejected the claim of Tucson to deliver water to users within the watershed drainage area but outside the critical area unless Tucson could show that in fact these users could by sinking their own wells draw water from the basin supply is pointed to as establishing significant inroads upon the rationale of Bristor I.

Not so. Again, we point to the fact that Jarvis II dealt with the area of Avra Valley versus the Tucson area. It did not deal with or consider the rights of any individual user in Avra Valley as against Ryan Field as a user.

Insofar as the Ryan Field holding is for consideration, it amounts to no more than a holding that since Ryan Field, as an industrial or domestic user, could itself put down a well and draw water from the common supply for use where pumped, there was no reason for requiring that Ryan Field should go to this expense. There was no claim or suggestion that the use by Ryan Field, even if drawn from an area other than the Ryan Field area, would damage any existing user adjacent to the Tucson well supplying Ryan Field and no implication that the Court gave any consideration to that possibility. It was an area use -- lawful in the area involved even though the instrumentality through which the groundwater was pumped and delivered was one foreign to the areas involved.

The ruling with respect to the users within the drainage area but outside the critical area points up the continuing viability of Bristor II. As a matter of law, users within the critical area as against new users in the area are presumptively damaged. However, if the usage by those outside the critical area is only of water which they would be entitled to pump and use by putting down pumps on their own land, then the critical area users are not damaged, since the overall supply is not diminished unlawfully. Again, this is an area application of Bristor, for certainly if the proposed pumping and delivery of critical groundwater area water from an area remote to the consumers would have resulted in injury to the water supply of the users adjacent to the Tucson pumping area, Bristor II would forbid such use.

Finally, the Court's relaxation of the injunction to

the extent Tucson in effect withdrew only the amount of groundwater it saved to the area by terminating consumptive use of groundwater resulting from agricultural uses does not in any fashion impair or limit Bristor II. Area versus area, there was no loss to the Avra Valley area, since this amount of water would have been lost to the area supply in any event. While the Court allowed withdrawal of goundwater by existing Tucson wells without requiring that such wells be in the immediate area of the land taken out of cultivation, it is clear that the Court was again dealing with the problem area versus area and not individual user versus individual user, or individual user versus Tucson. Bristor II would control usage if in fact Tucson's pumping drew water from an area other than the area acquired by Tucson and taken out of cultivation if such use by Tucson in fact damaged the individual farmers adjacent to the Tucson pumps.

JARVIS III

Jarvis III confirms the rationale of Bristor II and Jarvis I and II. In concluding its decision and opinion, this Court said:

> "We think it is apparent from an examination of our previous decisions that this Court did not intend to permit the transportation of water from a critical area where such transportation would tend to exhaust the common supply to the detriment of established users." 550 P. 2d 227 at 230.

STATE v. ANWAY

The suggestion has been made by several counsel that FICO in some manner overrules Anway. Anway is principally a statutory construction case. The case holds that since "under

the doctrine of reasonable use, [appellees] would have the right to use the water from their wells in any manner that they think most beneficial to the enjoyment of the property" unless A.R.S. §45-304 be construed to limit this use, appellees were free to make the use complained of by appellants. The sole question involved was whether a land owner might rotate his crops by allowing one field to lie fallow and use the water upon another field not previously irrigated -- both fields being within the critical groundwater area. This sole question turned upon the proper construction of the statutes involved. Indeed, the Court took pains to restate and rely upon Bristor II (87 Ariz. 206, 207).

FARMERS INVESTMENT COMPANY v. ANAMAX

FICO (we hope we are not starting a new series of FICO I, FICO II, etc.) simply reviews and restates the law and legal principles governing use of groundwater in Arizona as previously clearly stated by this Court in Bristor II, Jarvis I and Jarvis II. While a weakly colorable argument can be made for the claim that Jarvis II may be read as authorizing the view that groundwater may be pumped from one location in a groundwater basin having a common supply and used in another location in that basin having physical access to the common supply, there is nc language anywhere which even hints or weakly implies that this may be done if a land owner, owning land adjacent to the pumping site, is thereby damaged.

Even if this unlikely reading of Jarvis II be given some credence, Anamax cannot justify its conduct even under such a reading. Its conduct in beginning an expansion program and increasing its pumping from within the critical area for use outside that area can only be characterized as a rather flagrant flouting of rules this Court has plainly stated -- a calculated risk such as Pima Mining Company (now Cyprus Pima) took in

1969-1971.

Cyprus Pima has found an able advocate in counsel for Jarvis in the amici curiae brief filed pursuant to order of this Court. The Jarvis amici brief enlarges upon the investments made by the mines, particularly Pima, in the area, and speaks eloquently of the economic injury and disruption which the Court's opinion may cause. Counsel overlooks a previous engagement in which Pima appeared in this Court and sang a bolder tune.

In April, 1971, FICO sought injunctive relief in this Court in Cause No. 10486, entitled "Farmers Investment Company, a corporation, Petitioner, v. The State Land Department, Andrew L. Bettwy, State Land Commissioner and Pima Mining Company, real party in interest, Respondents".

In its verified complaint, FICO alleged that prior to June, 1969, it had informally protested the extraction by Pima of groundwater from the Sahuarita-Continental Critical Ground Water Area and its use outside that area to the injury of FICO. FICO alleged that in June, 1969, it formally put Pima on notice that its water use was unlawful and was damaging to FICO.

FICO had filed the present suit in November, 1969. In the April, 1971, Petition, it alleged that Pima was then (1971) enlarging its mill to mill 54,000 tons per day rather than 40,000 tons, and had constructed two large irrigation type wells within the critical area and westerly from FICO's Sahuarita Ranch, which it (Pima) was then proceeding to put into service to withdraw and transport additional amounts of water for its use outside the critical area.

Among other responses to the complaint of FICO, Paul W. Allen, president of Pima, made and filed his affidavit. Among other statements, Mr. Allen said:

. . .

"Pima filed Notices of Intention to Drill Well regarding its Wells 12 and 14 [the wells FICO complained of] before the Superior Court action was filed by Petitioner. Pima's Wells 12 and 14 were completely drilled in May and October, 1970, respectively. The expansion of Pima's milling capacity is due to be completed in November, 1971."

* * *

"Whether or not Pima can use <u>any</u> [emphasis affiant's] water is an issue which will be determined in the pending Superior Court action. Concededly, we have raised what we consider to be a justifiable defense of laches and estoppel regarding Pima's facilities commenced or completed prior to Spring, 1969, when Petitioner advised us to expand only at our peril.

"That latter peril we have assumed by commencing the present expansion program, by drilling Wells 12 and 14, and by doing the necessary to connect Wells 12 and 14 to our water system. If the Superior Court rules that we are not entitled to use Wells 12 and 14, Pima will be out of pocket."

The Territorial Supreme Court of Arizona had many of the same arguments "in terrorem" which various of the memoranda and motions have presented in this rehearing. In <u>Arizona Copper Co., Ltd. v. Gillespie</u>, 12 Ariz. 190, 100 P. 465, a farmer sought injunctive relief against pollution of his irrigation water by the mining company. That distinguished Court --

Kent, C.J., Sloan, Doan and Campbell, were not impressed. The Court said:

> "Counsel impress upon us the proposition that we should consider the comparative damage that will be done by granting or withholding an injunction in this case, alleging that the effect of an injunction will be to stop the operation of extensive works, deprive thousands of persons of employment, and cause loss and distress to other thousands. It is undoubtedly true that a court should exercise great care and caution in acting where such results are to follow. It should very clearly appear that the acts of the defendant are wrongful, and that the complainant is suffering substantial and irreparable injury, for which he cannot secure adequate compensation at law.
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> * * *
>
> "It seems to us that to withhold relief where irreparable injury is, and will continue to be, suffered by persons whose financial interests are small in comparison to those who wrong them is inconsistent with the spirit of our jurisprudence. It is in effect saying to the wrongdoer, 'If your financial interests are large enough so that to stop you will cause you great loss, you are at liberty to invade the rights of your smaller and less fortunate neighbors.' We prefer the doctrine adhered to by Judge Hawley in his dissenting opinion

in Mountain Copper Co. v. United States, 142 Fed. 625, 73 C.C.A. 621, and by Judge Sawyer in Woodruff v. Northbloomfield Gravel Min. Co. (C.C.), 18 Fed. 753, 9 Saw. 441. In the latter case, it is said: 'Of course great interests should not be overthrown on trifling or frivolous grounds, as where the maxim "De minimis non curat lex" is applicable; but every substantial, material right of person or property is entitled to protection against all the world. It is by protecting the most humble in his small estate against the encroachments of large capital and large interests that the poor man is ultimately enabled to become a capitalist himself. If the smaller interest must yield to the larger, all small property rights, and all smaller and less important enterprises, industries, and pursuits would sooner or later be absorbed by the large, more powerful few; and their development to a condition of value and importance, both to the individual and the public, would be arrested in its incipiency.' To the same effect are the remarks of Judge Marshall in McCleery v. Highland Boy Gold Min. Co. (C.C.), 140 Fed. 951, wherein he says: 'The substantial contention of the defendant is that it is engaged in a business of such extent, and involving such a large capital, that the value of the plaintiff's rights sought to

be protected is relatively small, and that therefore an injunction, destroying the defendant's business, would inflict a much greater injury on it than it would confer benefit upon the plaintiffs. Under such circumstances it is asserted, courts of equity refuse to protect legal rights by injunction and remit the injured party to the partial relief to be obtained in actions at law. Stated in another way, the claim in effect is that one wrongfully invading the legal rights of his neighbor will be permitted by a court of equity to continue the wrong indefinitely on condition that he invest sufficient capital in the undertaking. I am unable to accede to this statement of the law. If correct, the property of the poor is held by uncertain tenure, and the constitutional provisions forbidding the taking of property for private use would be of no avail. As a substitute it would be declared that private property is held on the condition that it may be taken by any person who can make a more profitable use of it, provided that such person shall be answerable in damage to the former owner for his injury. In a state of society the rights of the individual must to some extent be sacrificed to the rights of the social body; but this does not warrant the forcible taking of property from a man of small means to give

it to the wealthy man, on the ground that the public will be indirectly advantaged by the greater activity of the capitalist. Public policy, I think, is more concerned in the protection of individual rights than in the profits to inure to individuals by the invasion of those rights.' See, also, Sullivan v. Jones & Laughlin Steel Co., 208 Pa. 540, 57 Atl. 1065, 66 L.R.A. 712." 12 Ariz. 190 at 203-205.

It would seem that there are two conclusions to be drawn from the activities of Anamax in proceeding to boldly proceed in plans to enlarge its water use by drilling two additional wells in the critical area in the face of the pending lawsuit: (a) Anamax considered that the day of reckoning might be deferred until its water use would justify its expenditure, or (b) that the Court would shrink from facing the outcry which Anamax could engender from unions, merchants of the area, and others, who would accept the notion that the law should only be enforced if selfish interests are not thereby endangered.

Or that FICO was financially exhausted and morally dispirited.

Anamax was wrong on all counts.

RESPECTFULLY SUBMITTED this 21st day of October, 1976.

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COUNTY OF MARICOPA)

I **Antonio Bucci** hereby certify:
Name

That I am **Reference Librarian, Law & Research Library Division** of the Arizona State
Title/Division

Library, Archives and Public Records of the State of Arizona;

That there is on file in said Agency the following:

Arizona Supreme Court, Civil Cases on microfilm, Film #36.1.764, Case #11439-2, Response of Appellant Farmers Investment Company to Rehearing Applications, pages 604-627 (24 pages)

The reproduction(s) to which this affidavit is attached is/are a true and correct copy of the document(s) on file.

Antonio Bucci
Signature

Subscribed and sworn to before me this 12/15/05
Date

Etta Louise Muir
Signature, Notary Public

My commission expires 04/13/2009.
Date

Notary Public State of Arizona
Maricopa County
Etta Louise Muir
My Commission Expires
04/13/2009